

27th February 1753.

The CASE of CHARLES SCHAW of SAUCHIE, Lord CATHCART, Defender,
A G A I N S T

John Stewart-Nicolson Schaw, Heir of Entail of the Estate of Greenock, and Sir Michael Stewart of Blackhall, Bart. his Father and Administrator in Law, Pursuers.

U Pon the 11th May 1685, John Schaw younger of Greenock obtained a Charter, under the Great Seal, of the Lands of Easter and Wester-Greenocks, and others therein mentioned, which had been before erected in-
to the Barony of Greenock, proceeding upon the resignation of Sir John Schaw his father, "In favours of the said John Schaw younger, and the heirs male of his body, which failing, to the said Sir John Schaw elder and the heirs male of his body, which failing, to the eldest heir female of John Schaw younger his body", referring to Sir John Schaw elder his liferent of the lands of Wester-Greenock, and also of the Burgh of Barony of Greenock, and others therein mentioned. And in respect that the town of Greenock did at that time consist of a great number of trifling houses, upheld at the expence of the heritor, and which of consequence yielded little or no profit; the charter contains a clause in the following words: *Reservan. prefato domino Joanni Schaw, duran. tempore ejus vite, potestatem et libertatem faciendi et concedendi feudifirmas domorum et tenementorum, etiamque borto- rum infra urbem de Greenock.*

Upon the 15th September 1686, the late Sir John Schaw obtained a charter, under the Great Seal, of the lands and barony of Greenock, proceeding upon the resignation of the said John Schaw younger, his father, by which, failing the heirs male of the father and son, the estate is provided "to the heirs female of the late Sir John Schaw's body." And as by this charter the liferent of the whole lands is reserved to John Schaw the father, the charter contains a clause in the following words: *Necnon reservan. plenam potestatem et libertatem dict. Joanni Schaw, domus seu edificia in Greenock in feudum demittere, dummodo eadem non reddunt minus annuatim, nomine feudifirmæ, quam unam mercam propter lie fall terræ edificat. et tres solidos et quatuor denarios monetæ Scotiæ propter unaqueque lie fall terræ non edificat.*

Upon the 1st of 1700, the late Sir John Schaw entered into a contract of marriage with Mrs. Margaret Dalrymple, by which he and his father for their respective interests of liferent and fee abovementioned, for the sum of 25000 merks, acknowledged to have been received by Sir John the father, in name of tocher, obliged themselves to resign the barony of Greenock in favours of the said Sir John Schaw the father in liferent, and "to the late Sir John Schaw his son, and the heirs male of his body, in fee; which failing, to the heirs male of the father's body; which failing, to Mrs. Margaret Schaw, the late Sir John's only sister, afterwards Lady Houston, and the heirs whatsoever of her body," preferably to the late Sir John's own daughters. And it is informed that this last substitution happened thro' inadvertency, which is the more probable, as it is not easy to conceive any good reason, which could induce parties to alter the former investitures of the estate, by which, failing heirs male, the heirs female were called according to the natural order of succession.

There is another thing equally unaccountable in this contract, for altho' the late Sir John was then unlimited heir of the whole estate of Greenock, yet by this contract he is brought under prohibitory, irritant and resolute clauses, which give rise to the present question, and are exprest as follows.

"Providing also, that it shall not be lawful to, nor in the power of the said John Schaw, nor any of the heirs of tailzie and provision abovespecified, to alter, innovate or change this present tailzie and order of succession, nor to sell, alienate, dispone, either irredeemably or under reversion, nor yet to wadset nor burden with infestment of annualrent, or any other servitude or burden, the tailzied land and estate above written, or any part thereof, nor to set racks or rentals of the same, for any longer space than the setter's lifetime, or for nineteen years, and without diminution of the rental, except in case of necessity where a sufficient tenant cannot be found to pay the whole rent; nor yet to contract debts, excepting so far as they are empowered in manner aftermentioned, nor to do any other fact or deed, civil or criminal, directly or indirectly in any sort, whereby the said tailzied lands and estate or any part thereof may be affected, apprised, adjudged, forfeited, or any manner of way evicted from the said heirs of tailzie, or this present tailzie and order of succession thereto prejudged, hurt or changed. Neither shall the said John Schaw, nor any of the said heirs of tailzie suffer the duties of ward, marriage and relief, simple or tait, nor the feu, blanch and teind duties, nor other publick burthens and duties whatsoever, payable furth of the said tailzied lands and estate (by the not payment whereof the same may be evicted) to run on unsatisfied, so as therefor the lands and others foresaids may be evicted, apprised or adjudged from them, for any of the said casualties of superiority or publick burdens." And in case of contravention, it is thereby declared, not only, that all deeds done contrary to the tailzie, should be void and null; but also that the contraveeners should for themselves only, forfeit their right to the said lands and estate, "reserving always, notwithstanding of the premisses, full power and liberty to the said Sir John Schaw, and after his death to the said John Schaw his son, and the heirs of tailzie and provision above specified, to grant feus or long tacks for such spaces as they shall think fit, OF ANY PART OR PORTION OF THE SAID LANDS, the feu or tack duty not being under 20 shilling Scots for each fall of dwelling houses, and 5 shilling Scots for each fall of yards and office houses.

"And in respect that failing of heirs male to be procreate in this present marriage, the daughters or heirs female to be procreate of the same, are and shall be by this present contract and infestment appointed to follow hereupon, excluded from their right of succession in the said tailzied lands and estate; and it being just and reasonable, that the said daughters should be in that case competently provided according to their qualities, therefore the said Sir John and John Schaws, by thir presents, bind and oblige them, conjunctly and severally, and their heirs male and of tailzie abovementioned, succeeding to them in the foresaid lands and estate, to content and pay to the said daughters, one or mae, who shall be procreate of the said marriage, failing of heirs male thereof, the particular portions and provisions aftermentioned, viz. If there be only one daughter, the sum of thirty thousand merks for her portion; if two, the sum of 40000 merks Scots for their portions; and if there be three or more daughters, then the sum of 50000 merks for their portions. And which portions are and shall be payable at the said daughters their several ages of sixteen years compleat, or at their respective marriages, which of them shall first happen; and in case of failzie in paying the said portions in manner foresaid, the said Sir John and John Schaws hereby oblige them and their foresaids to pay further to the said daughters respective the sum of one hundred merks Scots, as liquidate expences for ilk thousand merks of their said several portions, with the annualrent of the said respective portions continually during the not payment thereof, after the several terms of payment abovementioned; and in the mean time while the said portions fall due, to maintain and educate the said daughters suitable to their qualities, and also to liberate and free the said daughters and their several portions, of all debts and burdens, that any ways may or can affect them as heirs of line to their father. And the said John Schaw younger of Greenock, hereby binds and obliges him and his heirs of tailzie abovementioned, to warrant and free the said Sir John his father, of and from all payment of the sums of money above specified, provided to the said daughters of this marriage, failing of heirs male thereof, and of all damage the said Sir John or his foresaids, shall any way sustain through his being bound conjunct with his said son, for the said provisions. And it is hereby provided and declared, that the said lands and estate of Greenock, and others above written, shall be the subject wherewith the said 50000 merks is to be burdened, so that if the said John Schaw younger, shall pay the same himself, he shall have liberty to contract that burden upon the said estate, or if Sir John his father pay the same, he shall have access to dispose upon as much of the said lands and estate, as will refund the said sum to him, and that notwithstanding of the disposition thereof abovementioned, made by him to his said eldest son, and the other heirs of tailzie above written.

"And also it is provided and declared, and shall be declared by the infestments to follow hereon, and all the subsequent conveyances of the said estate, that it shall be lawful to, and in the power of the said John Schaw, or any of the said heirs of tailzie, to contract the sum of 50000 merks Scots money of debt, and therewith to affect and burden in manner after specified the said lands and estate, for providing of their daughters or younger children; but it shall not be lawful to any of the succeeding heirs of tailzie, to contract any more debts for provision of their children, under the irritancies abovementioned, until first the debts contracted by their predecessors for provision of their children, be paid and cleared, at least, it shall only be lawful to them, to contract so much for the end foresaid, as with the predecessors debt above specified unpaid, shall amount to the sum of 50000 merks in the haill. Declaring always, that the legal reversion of any diligence or adjudication, children.

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15th Sept
1686.

1st May
1700.

Sir John
and Lady
Schaw's
contract
of mar-
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Irritan-
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Power to
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Portions
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Term of
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The estate
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Faculty
to Sir
John and
to the heirs
of tailzie
to burden
the estate,
for provi-
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children.

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tion, to be used for security of the debt, allowed by thir presents to be contracted for providing of children, shall never expire to carry away the irredeemable right of the said lands and estate, or any part thereof. But the said adjudications shall be always redeemable upon paying the sums for which the same shall be obtained, with the annualrent thereof. Declaring also, that this present tailzie and irritancies thereof, shall be no ways prejudicial to any execution competent upon this contract, in so far as the same is conceived in favours of the said Mrs. Margaret Dalrymple, and the daughters of the marriage, failing of heirs male thereof, which provisions in favours of the daughters of this marriage, are declared to exhaust the faculty abovementioned, of burdening the estate for provision of children, in case the same shall be exercised as a burden upon the said tailzied estate *pro tanto*."

At the date of this contract, the late Sir John Schaw had no less than five brothers, and for that reason, small attention seems to have been given to the female succession; but the whole of these five brothers having thereafter died without issue, and there being only one daughter procreate of the marriage, between the late Sir John Schaw and his Lady, the Lady Houstoun, Sir John's sister, came thereby to have a near prospect of the succession, and soon after the death of her five brothers, she, with consent of Sir John Houstoun her husband, brought an action against the late Sir John Schaw, her only remaining brother, concluding, "That he might be decerned to exhibit and produce the principal contract of marriage above recited, and that the same, when exhibited, should be decerned to be registrat in the books of council and session, to the effect that she and her husband might have a formal extract thereof, to be kept and used by them, as their own proper writ in time coming."

By way of defence against this action, Sir John repeated a declarator, concluding, that it might be found and declared, that he was absolute and unlimited fiar of his estate, and could not be bound up by any gratuitous personal bond of tailzie, upon which no infestment had followed; and accordingly the Lords of session pronounced an interlocutor, finding, "That the irritancies in the contract of marriage did not affect Sir John Schaw, who made the tailzie; and therefore declared, in so far as concerned the lands in the charter and infestment 1686, to which he had right before the contract and tailzie."

But the Lady Houstoun having reclaimed against the foresaid interlocutor, their Lordships, by a very narrow majority, pronounced decret, "Finding the irritancies and the clause not to alter, contained in the contract of marriage, are binding upon Sir John Schaw, who made the tailzie, even supposing Lady Houstoun were a gratuitous substitute." And this decret was thereafter finally affirmed by a judgment in the house of Peers, dated the 10th day of March 1717.

Sir John finding himself thus concluded by a strict interpretation of an inaccurate substitution, which had not been attended to by the parties concerned, judged it reasonable to exerce in favours of his natural heirs, every faculty and power which remained with him over his own estate: And the late Lord Cathcart, the defender's father, having proposed marriage to Sir John's only daughter, a minute of contract was executed, dated the 2d September 1718, by which, upon a narrative of the reserved powers in the entail, Sir John obliged him and his heirs of tailzie, succeeding to him in the estate of Greenock, to content and pay to the Lord Cathcart, the sum of 50,000 merks, as a part of his daughter's portion, "and to grant security for the same, upon the lands and estate of Greenock, obliging him and his heirs of tailzie, to relieve and disburden his other heirs and successors of the said sum, with the annualrent thereof."

Upon the faith of this minute, the marriage was accordingly celebrated, and soon thereafter, Sir John, in implement of the minute, granted three heritable bonds, amounting in whole to the foresaid sum of 50,000 merks; the first of which bonds being for the sum of 30,000 merks, is granted in implement of the obligation above recited, in favours of daughters in the event of their being excluded from the succession; and the other two bonds amounting in whole to the sum of 20,000 merks, are granted upon a narrative of the reserved faculty for providing daughters and younger children; and as the whole of these bonds bear annualrent from the 29th of March 1718, being the day of the marriage, so the heirs of tailzie are expressly obliged to pay the same, "and to relieve Sir John's other heirs, executors and successors, whatsoever, of the same;" and upon these bonds the late Lord Cathcart was duly infest by three sasines, dated the 6th of October 1719.

It has been above observed, that by the contract of marriage there is a power reserved to Sir John and the heirs of tailzie, to grant feus or long tacks of any part or portion of the estate, the feu or tack-duty not being under the rates therein mentioned: And therefore, as the town of Greenock continued much in the same state as formerly, and was always considered as a very precarious rent, upon the 3d of August 1719, Sir John disposed some old ruinous houses and yards, lying in and about the town of Greenock, amounting in whole to about nineteen acres, in favours of his daughter, the Lady Cathcart, and her heirs, therein mentioned, and obliged himself to infest her therein, to be held of him for payment of a feu-duty of 966 l. 8 s. 4 d. Scots, being at the rate of 20 shilling Scots for each fall of dwelling-houses, and 5 shilling Scots for each fall of yards and office-houses.

Upon this feu right the Lady Cathcart was duly infest upon the 30th of May 1720, and her infestment was thereafter confirmed by a charter under the Great Seal, dated the 26th of July that year; and as her Ladyship entered to possession upon this feu-right, so the defender, since her death, has made up titles to her, in virtue of which he has continued to possess, and laid out considerable sums of money in improving and adorning the town.

Sir John granted feus to the defender of the mansion-house, office-houses and gardens of Greenock, and also of two different parcels of ground lying near to the town of Greenock, which was intended for freighting the south-boundary of the town, and for building a new church, which at present is greatly wanted in that place; and for the whole of the subjects comprehended under these feus, which amount only to about twelve acres, the defender became obliged to pay at the different rates of 20 shillings, and 5 shillings, as directed by the Tailzie.

Upon the first November 1751, Sir John granted another feu-right to the defender of certain farms, being part of the estate of Wester-Greenock, at the then present rent of the lands, by way of feu-duty, with an addition of 20 shilling for each fall of dwelling-houses, and 5 shilling for each fall of office-houses and yards, which amounts in whole to the sum of 312 l. 16 s. Scots, above the present rent of these farms; and the whole of these feu rights are qualified by a clause adjoined to each of them, in the following words: "And whereas, I conceive this present feu right, and hails clauses, powers and privileges therein contained, to be within the powers and faculties reserved to me by the entail of the estate of Greenock; yet nevertheless, in case the same shall in any point or circumstance be construed or interpret to exceed, or be contrary to my powers and faculties over the said estate of Greenock, it is hereby expressly provided and declared, that the same is granted by me, and accepted by the said Charles Schaw of Sauchie, Lord Cathcart, with and under this provision and quality, that the same is to be regulated and limited according to my said powers and faculties, and shall stand and be effectual in so far as is consistent therewith, the same being granted not to exceed but to exerce in so far my said powers and faculties."

The pursuer, the next heir of entail, has brought a reduction of the whole of these deeds, and of certain others, upon reasons which fall now to be particularly considered; but before descending to particulars, it will be necessary to premise the following general observations, which will go far to obviate the several reasons of reduction.

And in the first place it is a point agreed by all our lawyers, that entails are *strictissimi juris*, and therefore as all limitations upon the fiar are to be strictly interpreted, so all faculties ought to be interpreted in the most beneficial manner.

2dly, If this rule holds in the general, it ought *a fortiori* to hold in the present case; for as at the date of the contract of marriage, the late Sir John Schaw was unlimited fiar of this estate, so he is still to be considered in the same light, unless in so far as he has limited and restricted himself in express words.

And 3dly, There is the greater reason in the present case for a liberal interpretation of Sir John's powers, as he has exercised them in the most rational manner, in favours of the defender his heir at law, which was no ways blameable, but on the contrary laudable, as his own estate over which he had once unlimited power, was now contrary to his own inclination to go to a stranger, in prejudice of his heir at law.

These things being premised, the defender shall now proceed to consider the several deeds with the reasons of reduction brought against them; and to begin with the three bonds granted to Lord Cathcart.

It is objected 1mo, That in the event which has happened, Sir John had no power to burden the estate with

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Lady Houstoun's process.

Sir John Schaw's process.

Judgment thereon.

Bonds to Lord Cathcart for 50000 merks.

Feu of the town to Lady Cathcart in 1719.

with more than 30000 merks, which he is obliged to pay to an only daughter, in the event of her being excluded from the succession. Bonds granted to Lady Cathcart. Answer.

By an express clause in the tailzie, it is declared, "That it should be lawful for Sir John, or any of the heirs of tailzie, to burden the estate with 50,000 merks of debt, for providing their daughters or younger children." And therefore, though Sir John is obliged by another clause to pay 30,000 merks to an only daughter, in the event of her being excluded by an heir-male; yet this did not hinder him from exercising the faculty reserved to him by the former clause; and accordingly, the first bond for 30,000 merks is granted in implement of the obligation, and the two other bonds are granted in virtue of the powers reserved by the faculty.

As by the tailzie, Sir John had no power to burden the estate beyond the sum of 50,000 merks; the annualrent which fell due upon the three bonds during Sir John's Life, can be no burden upon the heirs of entail, who cannot be liable further than for the precise sum with which Sir John had reserved power to burden the estate. Object. 2.

By the contract of marriage, Sir John obliges himself and his heirs of tailzie, to pay the sum of 30,000 merks to an only daughter, in the event of her being excluded from the succession, and as this provision is declared to be payable to such daughter at her age of sixteen or marriage, which of them shall first happen; so it is expressly declared, that it is to bear annualrent during the not payment after the several terms above-mentioned: And therefore, as it is admitted by the pursuer, that the heirs of tailzie are liable for the principal sum, so they must also for the same reason be liable for the annualrents thereof, as they are both only parts of the same obligation. Answer 1.

And as to the other two bonds granted by Sir John in pursuance of the faculty; the heir of tailzie must also be liable for the annualrents of these bonds, not only because a power reserved to burden with the principal sum, implies also a power to burden with the annualrents; but more especially, because that the clause empowering the several heirs, to provide their daughters and younger children, is not in the ordinary stile, but declares, "that it shall be lawful for Sir John, or any of the heirs of tailzie, TO CONTRACT the sum of 50000 merks of debt, and therewith to affect and burden the estate." Which evidently supposes, that the sum was first to be borrowed, and then the estate burdened therewith; and therefore as it could not be thought, that any creditor would advance so large a sum without annualrent, it must be presumed to have been the intention of parties, that it was to be in the power of Sir John and the heirs of entail to burden the estate not only with the principal sum, but also with the annualrents thereof; and this interpretation is fortified by a subsequent part of the same clause, which provides that the legal reversion of adjudications, led for security of these provisions, shall never expire, but shall be always redeemable, upon payment of the sum for which the same shall be obtained, with the annualrents thereof; which evidently implies that the annualrents, as well as the principal sum, were to be a burden upon the tailzied estate. Answer 2.

Tho' it should be found that Sir John could lawfully burden the entailed estate with 50000 merks, and the interest of it, and that the heirs of tailzie are liable for the same; yet he is intitled to relief from Sir John's executors, and heirs of line, of the interest which fell due, while Sir John was in possession of the estate, in respect of a supposed implied obligation upon Sir John, to relieve the tailzied estate of these annualrents. Object. 3.

If it shall be once supposed that Sir John had a power to burden the tailzied estate, not only with the principal sum, but also with the annualrents, it necessarily follows, that the pursuer as heir of tailzie, is intitled to no relief; for tho' the law has introduced a right of relief among the different kinds of heirs, yet it is in the power of the debtor to dispense with this relief, and make his several heirs liable in such order as he may think proper: And therefore, as in the several bonds granted to Lord Cathcart, Sir John has expressly obliged his heirs of tailzie to relieve his other heirs of the principal and annualrents therein contained, this obligation must have its full effect. And as to the pretence of an implied obligation on Sir John Schaw to relieve the tailzied estate of all annualrents, which fell due during his own Life, the defender cannot discover any foundation for such pretence; more especially as the tailzie which enables Sir John, and the heirs of tailzie, to burden the estate with these provisions, contains no clause obliging them to pay the annualrents which fall due during their respective possessions; altho' at the same time it contains an express clause, obliging them under an irritancy to pay the casualties of superiority and publick burdens, and not to suffer the same to run on, "so as that thereby the estate may be evicted." Answer.

And lastly, upon this head, supposing there were any difficulty in the question, with regard to the annualrent of the 20000 merks contracted in exercise of the faculty, there can be no doubt that the annualrents of the 30000 merks, which Sir John was obliged to pay to the daughter of the marriage, must fall ultimately and without relief upon the tailzied estate, not only because the contract provides, "That the tailzied estate is the subject to be burdened with this provision." But also as it further obliges Sir John and his heirs of tailzie, "to liberate and free the daughters, and their several portions, of all debts and burdens that any ways may or can affect them, as heirs of line to their father."

As to the several feu rights granted by Sir John, it will be necessary to consider the reasons of reduction separately, as they apply to the several feus, and to begin with the feu of certain farms, part of the wester barony, which are feued out at the present rent, with an additional feu-duty, upon account of dwelling houses, yards and office houses. Feu grants made by Sir John Schaw.

By the entail Sir John was only empowered to feu out urban tenements, or lands for the purpose of building, but had no power to feu out farms in the country; for otherwise Sir John might have feued the whole estate for an elufory duty, and so the clause prohibiting alienations or setting tacks, without diminution of the rental, might be rendered of no effect. Object. 1. to the feu of the farms.

By the entail Sir John expressly reserves power, "to grant feus or long tacks of any part or portion of the estate;" and therefore as the words are general, and extend both to rural and urban tenements, there can be no reason for restricting them to the last, and no argument can be drawn from the preceeding clause, prohibiting alienation or setting of tacks; for the obvious meaning of these two clauses, when compared together, is that Sir John and the several heirs of tailzie, were to have a power of feuing out any part of the estate, but so as not to alienate or dilapidate the estate: And tho' this might have been a ground for reducing a feu of the estate for an elufory duty, yet it cannot be explained so as to hinder Sir John from feuing at the present rent; and supposing there was any contrariety betwixt the two clauses, that interpretation ought to be followed, which is most beneficial for Sir John, who at the date of the tailzie was unlimited fiar of the whole estate; and that the clause has been always so understood, appears from a feu of the lands of Braidstane, being part of the tailzied estate, granted by Sir John Schaw elder in the month of September 1701, which was within seven months after the date of the tailzie. Answer.

By the aforesaid feu right, the defender has a privilege of working coal, limestone and all other minerals, and also a proportional part of the loft in the church, which had been appropriated to the tenants of the barony. Object. 2.

As it was lawful to grant the feu of the lands, it was lawful to grant the privileges mentioned in the objection, as these were all natural consequences of the feu. Answer.

As to the feu of the houses and yards, &c. lying in and about the town of Greenock, the pursuer admits that Sir John had a power of feuing out small parts of the town, for the purpose of building. But

Object. 1mo, That he had no power to grant a feu of the whole town to one person.

By the entail Sir John reserves power "to grant feus of any part or portion of the estate;" and as he is no ways limited as to the extent of the ground to be feued out, it is incongruous to plead that he could not lawfully feu out to what extent he pleased, or that he could have feued out the whole estate to different persons, but yet could not feu 21 acres to one person, which is the total extent of these feus. This is so whimsical an interpretation of the clause, that it cannot be lifted to, more especially as the granting of these feus was a reasonable act of administration for the benefit of the estate, as the rent of the town was altogether precarious, and the feu duty payable by the defender for these 21 acres is no less than 1082 l. Object. 1. to the feu of the town, &c. Answer.

By the feu right in question, the defender is only obliged to pay at the rate of 20 shillings for each fall of dwelling houses then built, and at the rate of 5 shillings for each fall of yards and office houses; whereas it is alleged



ged that by the tailzie he ought to have been obliged to pay 20 shillings for each fall of the ground feued, which should be thereafter converted into dwelling houses.

Answer. The clause in the entail only provides, that the feu duty of yards and office houses, shall not be under 5 shilling Scots per fall, but does not provide, that the feu duty shall rise to 20 shillings upon such office houses and yards their being converted into dwelling houses; and this interpretation is strongly fortified from the like clause in the charter 1686 aboverecited, where the distinction is made between ground *built* and ground *unbuilt*, that the first was not to be feued under a merk, and the last not under 40 pennies per fall, which is greatly below the feu duty payable by the defender.

Object. 3. By the feu of the town, granted to the defender, he is freed from the legal irritancy *ob non solum canonem* the duplication of the feu duty, upon the entry of heirs, and the composition due by a singular successor is taxed to 40 l. Scots, and he is also freed from thirlage, shore dues and ministers stipends, cels and all other publick burdens whatever, which it is pretended are natural burdens upon feus, and could not be dispensed with by Sir John.

Answer. Before the tailzie, Sir John was absolute fiar of this estate, and of consequence could have disposed of it at pleasure; and tho' by the tailzie he has subjected himself to several limitations, yet as he had reserved to himself a power of feuing out any part of the estate, his right of granting feus is as strong as it was before the tailzie, with one limitation only, viz. That the feu duty for dwelling houses, office houses and yards should not be under the rates mentioned in the tailzie and therefore as before the tailzie; there can be no doubt that Sir John could have lawfully and effectually feued out any part of the estate, so as that the feuer should be free of the several burdens mentioned in the objection, so there can be as little doubt in the present case, as Sir John's power of feuing was restrained by one limitation only, which he has strictly observed.

Object. 4. The defender is only obliged to pay 20 shilling Scots for all ground that may happen hereafter to be gained off the Sea.

Answer. The *littus maris*, so far as the sea ebbs and flows, is *juris publici*, and in strict propriety belongs neither to the heir of entail, nor to the vassal; at the same time it is the opinion of lawyers, that heritors having right to grounds lying on the sea-shore, may lawfully gain from the sea, as far as that can be done without prejudice to the publick; and therefore, in so far as the defender's feu lies along the sea-shore, he has of consequence a right to gain off the sea, and as the ground so gained was originally *juris publici*, and can in no sense be considered as a part of the tailzied estate, there does not appear to be any good reason for making the defender liable in any additional feu-duty for the ground so gained; and accordingly in all the old feus which had been formerly granted by Sir John's father and grand-father, this privilege of gaining off the sea is given without making the feuar liable in any additional feu-duty.

And the like answer is made to another objection of the same sort, viz. that the defender is not obliged to pay any feu-duty for such streets and vennels as ly locally within his feu; for as these vennels and streets are properly *juris publici*, they are expressly excepted from the feu-right, and therefore it would be absurd to make the defender liable in any additional feu-duty upon that account.

Object. 5. By the said feu-right the defender has a privilege of winning and leading of stones from any quarries lying within the lands of Wester-Greenock and Finnart, upon payment only of one shilling sterling for such a quantity of stones, as may be necessary for building one rood of work.

Answer. It is supposed by the pursuer, that the chief intention of this reservation in the tailzie, was to enable Sir John and the heirs of tailzie to feu out ground for building; and that being the case, it must be presumed, that it was the intention of parties, that the persons to whom the feus were granted, should have the privilege of any quarries in the neighbourhood, since, without that privilege, the end proposed could not be obtained: And accordingly in all and each of the feus granted by Sir John's father and grand-father, the privilege of quarries is granted in the very same terms in which it is granted to the defender.

Feu of the mansion-house, &c. As to the feus of the mansion-house, office-houses and gardens of Greenock; these feus depend upon the same principles with the feu of the town, the feu-duty in both being the same, that is, twenty shillings per fall for the dwelling-house, and five shillings per fall for yards and office-houses; and although a mighty clamour has been raised about the feu of the mansion-house, yet the pursuer has the less reason to complain upon this head, as the defender is able to prove, that at the date of the tailzie, the mansion-house of Greenock was almost altogether ruinous, and that it has been since almost all re-built at the expence of the late Sir John Schaw.

Tack of Wester-Greenock. The Pursuer has been pleased also to object against a tack of the wester-barony of Greenock, for the space of nineteen years granted by Sir John Schaw to the defender, upon two grounds. 1st, That at the commencement of this tack, some of the tenants had tacks for terms then current. And, 2^{dly}, That by the said tack the defender is only obliged to leave the houses that shall be on the lands, in as good condition as they are at present: But to these things the answer is abundantly obvious; for although it may be true, that some few of the farms were then under tack, yet by the tack granted to the defender, he has a power to uplift the rents from the sub-tenants, and to remove and in-put tenants, and therefore *quoad* these farms, it is properly to be considered as a tack of the tack-duties, which is most certainly binding in law.

And as to the other objection concerning the upholding of the houses; it is answered, that by the entail Sir John has the same power of granting tacks, which he formerly had, with one limitation only, viz. that he could not grant any tacks, so as to diminish the rental; and therefore as it cannot be said, that the tack-duty due by the defender, is lower than the rent, as it stood at the date of the tailzie, the objection against the tack ought to be repelled; and as the defender knows of no law which obliges an heir of entail to keep up the whole houses which may happen to be on the estate at the time of his entry, so in many cases it may be for the advantage of the tailzied estate, that the whole houses should not be kept up, but that two or three farms should be thrown into one, and this was truly the case, with respect to the lands of Wester-Greenock, the subject of this tack, which at present consists of a great number of trifling farms, paying only 50 l. or 60 l. Scots per annum.

Sale of timber. The pursuer concludes also for reduction of a contract of sale, by which Sir John sold to the defender the whole trees then growing upon the estate of Greenock, with power to enter directly to the possession, and to cut and carry away the same betwixt and the 1st of January 1763.

Answer. There is no clause in the entail, which restrains Sir John from the privilege of cutting and felling wood; and therefore, as such a contract made by Sir John before the tailzie, would have been effectual to the purchaser, even after Sir John's death, it must be equally effectual in the present case, though made after the tailzie, as Sir John's powers must be understood to have remained with him, unless in so far as he was expressly limited; and no argument can be drawn from a late decision in the case of the executors of the Lady Forfar, who was only a liferenter, to the present case, where Sir John had the absolute fee and property of the whole estate, subject to no limitations, excepting only these which are expressly mentioned in the tailzie; and the pursuer has the less reason to complain, as almost the whole of the trees conveyed by this contract, had been originally planted by the late Sir John Schaw, since the date of his contract of marriage.

Upon the whole, as the late Sir John Schaw had thro' inadvertency, rather than from any deliberate purpose, brought himself under such limitations, that his estate behoved to go contrary to his own inclination to a stranger, in prejudice of his heir at law; it was not only lawful and just, but also extremely proper for Sir John to exerce every faculty which remained with him over that estate, in favours of the defender, his grandson and heir at law; and as the defender hopes he has satisfied your lordships, that the whole deeds done by Sir John, may be well supported by Sir John's original powers over the estate, and these reserved to him by the tailzie, it has no favourable appearance on the part of the pursuer, that a reduction has been attempted of every one of these deeds; and it is wrong in the pursuer to say, that Sir John had left him and the other heirs of entail, little more than an empty name, when after all the deeds executed by Sir John, the pursuer will still remain in possession of an estate of 960 l. sterling per annum, burdened only with a liferent of 4800 merks to Lady Schaw, and a portion of 50,000 merks, with the annualrent thereof, which Sir John had obliged himself to pay to the defender's mother, his only daughter.

In respect whereof, the several reasons of reduction ought to be repelled, and the defender assilized from this process.

GEO. BROWN.

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